Supreme Court, U.S.
FILED
NOV 23 2009
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No. 09-259

IN THE

Supreme Court of the United States

METRO LIGHTS, L.L.C.,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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November 23, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

For the past generation, the law governing First Amendment constraints on commercial sign regulations has existed in a state of suspended animation. This Court's splintered decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), produced, as then-Justice Rehnquist foresaw, "a virtual Tower of Babel, from which no definitive principles can be clearly drawn," *id.* at 569 (dissenting opinion). As explained in the petition, the lower courts have struggled mightily over the years to discern what governing legal principles, if any, can be drawn from *Metromedia*, *see, e.g.*, *Rappa v. New Castle County*, 18 F.3d 1043, 1061 n.28 (3d Cir. 1994) (Becker, C.J., joined by Alito, J.) (expressing the "hope" that this Court will "clarify and rectify the problems created by its splintered opinion in *Metromedia*"), and this Court's subsequent commercial speech cases are, to say the least, "in significant tension" with the *Metromedia* plurality decision, *id.* at 1065 n.35; *see also* Pet. App. 19a, 27a.

Respondent Los Angeles, however, insists that *Metromedia* produced a "clear majority" ruling categorically allowing local governments to ban commercial signs either entirely or selectively without raising any First Amendment concerns. Opp. 8; *see also id.* at 16. If anything, that assertion only underscores why certiorari is warranted. Putting aside the fact that there was no "clear majority" in *Metromedia*, and that Los Angeles asserts otherwise only by adding Justice Stevens' *dissenting* vote to the plurality, Los Angeles' characterization of *Metromedia* would put that case at odds with settled commercial speech doctrine. If

indeed *Metromedia* categorically rejected any underinclusivity analysis in the context of commercial sign regulations, then the case cannot be squared with this Court's subsequent commercial speech jurisprudence. *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Los Angeles does not deny this point, but simply insists (as did the Ninth Circuit below) that *Metromedia* established a distinct "law of billboards" governed by its own unique rules. Opp. 13 n.10; Pet. App. 17-20a, 27a.

But that is *ipse dixit*, not legal reasoning. Indeed, as noted in the petition, other circuits have applied an underinclusivity analysis in the context of commercial sign regulations. *See, e.g.*, *Pagan v. Fruchey*, 492 F.3d 766, 774-78 & n.8 (6th Cir. 2007) (*en banc*); *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1113-16 (7th Cir. 1999); *National Adver. Co. v. City & County of Denver*, 912 F.2d 405, 408-10 (10th Cir. 1990). At the end of the day, though, there is no denying the tension between the *Metromedia* plurality decision and this Court's subsequent precedents—but that is a reason for this Court to *grant* review, not *deny* it. The Ninth Circuit below effectively threw up its hands and declared that it was up to this Court to resolve that tension, *see* Pet. App. 27a, and on this point at least the lower court was right. The time has come for this Court to revisit *Metromedia*, and to provide long-overdue guidance to the lower courts, local governments, and sign owners regarding First Amendment constraints on commercial sign regulations.

REASONS FOR GRANTING THE WRIT

I. This Court Should Revisit *Metromedia*.

As a threshold matter, Los Angeles appears to be in denial about the issue presented in this case. According to Los Angeles, "[t]his case concerns a city's right to place advertising signs on its own bus shelters." Opp. 2. But no one is challenging Los Angeles' "right to place advertising signs on its own bus shelters." *Id.* Rather, this case concerns Los Angeles' efforts to prevent *petitioner* from placing identical advertising signs on *private* property.

In particular, petitioner contends that Los Angeles has violated the First Amendment by banning new commercial signs, ostensibly for aesthetic and safety reasons, while simultaneously authorizing the placement of thousands of identical signs on City-owned "Street Furniture" across the City. This is a classic underinclusivity challenge to a commercial speech restriction. *See, e.g.*, *Greater New Orleans*, 527 U.S. at 188-95; *Discovery Network*, 507 U.S. at 424-30. Indeed, the district court below had no difficulty upholding the challenge under this line of cases. *See* Pet. App. 63-85a.

Los Angeles insists, however, that *Metromedia* stands for the sweeping proposition that, as a matter of law, "a city may impose a city-wide ban on all new offsite commercial signs, and that such a ban may exempt onsite and other specified types of signs, all without violating the First Amendment." Opp. 16; *see also id.* at 4 ("[A] ban on billboards will continue to satisfy the 'direct advancement' element of the *Central Hudson* test even where a city carves out an exception for certain signs, such as onsite signs or, here, for bus shelter signs.") (referring to *Central*

Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)). That argument, however, cannot be squared with the commercial speech precedents noted above.

Los Angeles thus retreats (as did the Ninth Circuit) to the argument that *Metromedia* fenced off "the law of billboards" as a ghetto within this Court's broader commercial speech jurisprudence. *See* Opp. 13 n.10; *see also* Pet. App. 27a; *Ackerley Commc'ns of N.W. Inc. v. Krochalis*, 108 F.3d 1095, 1099 & nn.5, 6 (9th Cir. 1997). But the *Metromedia* plurality purported to apply the very same *Central Hudson* test that this Court has continued to apply in the commercial speech context more generally. *See* 453 U.S. at 507-12 (plurality). And that test requires courts to analyze, among other things, whether the challenged regulation "'directly advances'" the governmental interests asserted, *id.* at 507-08 (quoting *Central Hudson*, 447 U.S. at 566)—*i.e.*, whether the challenged regulation is underinclusive, *see, e.g.*, *Greater New Orleans*, 527 U.S. at 188-95; *Discovery Network*, 507 U.S. at 424-30. Indeed, the *Discovery Network* Court specifically rejected the notion that *Metromedia* categorically foreclosed any and all underinclusivity challenges in the context of commercial sign regulations. *See id.* at 425 n.20.

Nor is there any merit to Los Angeles' assertion to that "[t]here is no ... conflict among the circuits on the specific legal issue at the heart of the instant case, which is whether a de facto exception to a city's ban on billboards causes the ban to violate the First Amendment." Opp. 8. As noted in the petition, there is indeed such a conflict: whereas the Ninth Circuit holds that underinclusive commercial sign

regulations do not violate the First Amendment as a matter of law, other circuits recognize that such regulations are subject to underinclusivity scrutiny. *Compare* Pet. App. 20-33a; *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 816 (9th Cir. 2003) (if a commercial sign regulation serves a valid governmental interest, "it should not matter that it is underinclusive"); *Ackerley*, 108 F.3d at 1099-1100 ("As a matter of law Seattle's ordinance, enacted to further the city's interests in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests.") *with Pagan*, 492 F.3d at 774-78 & n.8 (applying underinclusivity analysis to commercial sign regulation); *Lavey*, 171 F.3d at 1113-16 (same); *Denver*, 912 F.2d at 408-10 (same).

Lurking beneath all of these cases is substantial confusion over what binding legal principles, if any, can be gleaned from this Court's splintered decision in *Metromedia*, and how any such principles can be reconciled with subsequent commercial speech cases. Los Angeles tries to gloss over this confusion by declaring that "[t]he *Metromedia* Court *did* produce binding law" insofar as "a majority of that Court, comprised of the four-Justice plurality and Justice Stevens's dissent, expressly ruled that a city may impose a city-wide ban on all new offsite commercial signs, and that such a ban may exempt onsite and other specified types of signs, all without violating the First Amendment." Opp. 16 (emphasis in original); *see also id.* at 6 ("[A] clear majority of the *Metromedia* Court (composed of a four-Justice plurality and Justice Steven's [*sic*] express joinder with the plurality's commercial speech ruling) did

hand down a firm ruling upholding local bans of new billboards.").

As Los Angeles recognizes elsewhere in its brief, however, this is no way "[t]o determine if a controlling opinion exists." Opp. 9 n.7. Rather, "the holding of a majority of the Court can be viewed as that position that reflects the narrowest ground for agreement *among the five Justices that comprise the majority*." *Id.* (emphasis added; citing *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997), and *Marks v. United States*, 430 U.S. 188, 193 (1977)). A dissenting opinion is not entitled to any weight in this analysis. *See O'Dell*, 521 U.S. at 160; *Marks*, 430 U.S. at 193. Because the plurality and concurrence in *Metromedia* shared no common analytical ground, that case did not establish any binding law, either with respect to commercial or noncommercial speech. *See, e.g., Rappa*, 18 F.3d at 1057-60; *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n.9 (6th Cir. 1991), *aff'd*, 507 U.S. 410 (1993).

Los Angeles thus errs by arguing that *Metromedia* established binding law in the context of commercial speech, and trying to distinguish *Rappa* and *Discovery Network* as "cases deal[ing] with noncommercial speech." Opp. 8-9. The statutes at issue in *Rappa* restricted *both* commercial and non-commercial speech. *See* 18 F.3d at 1050-53 & n.10; *see also id.* at 1065 n.35 (noting that "[t]he statutes at issue in this case significantly limit some non-commercial speech as well as some commercial speech"). And the ordinance at issue in *Discovery Network* also targeted commercial speech. *See* 946 F.2d at 466 & nn.1, 2; 507 U.S. at 412-13 & nn. 2, 3.

As noted above, however, both cases specifically held that *Metromedia* did not establish binding law in the context of commercial speech. *See Rappa*, 18 F.3d at 1057-60; *Discovery Network*, 946 F.2d at 470 n.9.

Indeed, *Rappa* crafted its own First Amendment analysis applicable to both commercial and noncommercial sign restrictions. *See* 18 F.3d at 1065. Then-Judge Alito concurred in *Rappa* to "endorse" that analysis "[u]ntil the Supreme Court provides further guidance concerning the constitutionality of sign laws." 18 F.3d at 1080 (Alito, J., concurring). Because Los Angeles cannot deny that the Third Circuit in *Rappa* applied an entirely different analysis than the Ninth Circuit below, the City dismisses *Rappa* as an outlier that "no other circuit" has followed, Opp. 9 n.6—thereby only underscoring the circuit conflict on this issue.

Los Angeles argues, however, that this Court "expressly reaffirmed" *Metromedia* in *City of Ladue v. Gilleo*, 512 U.S. 43, 49-50 (1994), and *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984). Opp. 11. But neither of those cases (unlike *Metromedia*) involved a restriction on commercial signs on private property, which is why the decision below relied on *Metromedia*, not these other cases. Indeed, *Ladue* underscored that *Metromedia* had "'invalidated the San Diego ordinance in its entirety.'" Pet. 16 (quoting 512 U.S. at 49).

Los Angeles also asserts that "overturning *Metromedia* would undo three decades of jurisprudence that has carefully balanced the respective rights of sign companies, local governments, and the public." Opp. 6. As an initial

matter, as explained above, there is nothing to "overturn[]," *id.*: *Metromedia* produced no majority opinion, and actually invalidated the challenged San Diego ordinance in its entirety. And as to the assertion that the lower courts have applied a "careful[] balance[]" in this area, *id.*, the decision below only underscores that some lower courts interpret *Metromedia* to *exempt* commercial sign regulations from the careful balance otherwise applicable to commercial speech regulations. *See, e.g.*, Pet. App. 19a, 27a; *Ackerley*, 108 F.3d at 1099-1100.

In particular, the decision below underscores that some lower courts interpret *Metromedia* to require them to "give[] a generous amount of deference to cities to decide how to implement local bans on billboards," including deference with respect to exemptions. Opp. 5. But such deference is yet another reason why it is impossible to square the *Metromedia* plurality opinion with this Court's broader commercial speech jurisprudence, which does *not* defer to the very government entities that have restricted commercial speech in the first place. The "principled line of jurisprudence" to which Los Angeles refers, Opp. 10, thus represents a wholly unprincipled deviation from generally applicable First Amendment law.

At bottom, it is hard to overstate the confusion spawned by this Court's splintered decision in *Metromedia*. Even the Ninth Circuit did not deny this confusion, but insisted that this Court alone had "'the prerogative'" of revisiting its decisions. Pet. App. 27a (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484

(1989)). This Court should now exercise that prerogative to provide guidance on the important and much-litigated issues in dispute here.

II. Los Angeles' Underinclusive Ban On Commercial Signs Violates The First Amendment.

Turning to the merits of petitioner's First Amendment claim, Los Angeles insists that its ban on new commercial signs is not unconstitutionally underinclusive. According to the City, "the de facto exception for bus shelter signs does not cause [the] ban to lose virtually all effectiveness in furthering the goals of improving aesthetics and traffic safety." Opp. 14.

The Ninth Circuit, however, never reached this issue. Instead, in light of its expansive interpretation of *Metromedia*, the court held that the exceptions to Los Angeles' ban do not render that ban underinclusive *as a matter of law*. According to the Ninth Circuit, because *Metromedia* rejected an underinclusivity challenge to the San Diego sign ordinance at issue there, petitioner's underinclusivity challenge to the Los Angeles sign ordinance at issue here necessarily fails too. *See* Pet. App. 20-33a. In particular, the Ninth Circuit held, "*Metromedia* upheld a ban on offsite commercial advertising that included an exception for bus stop benches," which the court analogized to Los Angeles' exception for "Street Furniture." Pet. App. 21a.

But nothing in *Metromedia* suggests that *any and all* exemptions for structures associated with public transportation necessarily satisfy First Amendment scrutiny as a matter of law. To the contrary, courts cannot assess underinclusivity in the abstract, but

must carefully analyze the operation of a specific challenged scheme. Whether a particular exception renders a general ban on commercial speech fatally underinclusive depends on the scope of that particular exception. Indeed, it is hard to put this point any better than Los Angeles itself has done: "[t]he [underinclusivity] analysis under the third part of the *Central Hudson* test has always been fluid, fact-specific, and dependent on degree." Opp. 15.

The problem here is that the Ninth Circuit below interpreted *Metromedia* in a *rigid* manner to resolve this case as a matter of law. Los Angeles defends that categorical approach by asserting that "[b]us shelter signs, *being inherently limited in number and size*, pose no threat of undermining a ban on billboards." Opp. 4 (emphasis added). But there is nothing "inherently limited" about the "number and size" of "bus shelter signs" as a matter of law. That is particularly true in light of Los Angeles' capacious definition of "bus shelters." *See* Opp. 2 n.1 ("The term 'bus shelters' will be used in this brief to collectively refer to covered bus benches and other street furniture such as informational kiosks and automated public toilets."). As the district court explained, the "Street Furniture" at issue here includes "automated public toilets, kiosks, news racks, and transit shelters." Pet. App. 43a.

Thus, the district court (which, in sharp contrast to the Ninth Circuit, actually analyzed the operation of the Los Angeles scheme) had no trouble concluding that the "colossal exception" carved out for the "Street Furniture" rendered the ban unconstitutionally underinclusive under *Greater New*

Orleans and *Discovery Network*. Pet. App. 83a. As the district court explained, "'[t]he operation of ... [the] regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.'" Pet. App. 72a (quoting *Greater New Orleans*, 527 U.S. at 190).

Perhaps sensing that it cannot win the underinclusivity point, the City trots out the alternative argument that "Los Angeles' own bus shelter signs, which are governmental speech, [are] not subject to the First Amendment." Opp. 21. That argument totally misses the point. As the City itself explains, citing *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1130 (2009), there is a fundamental distinction under the First Amendment between "the government's own expressive activity" and "the government's regulation of private speech." Opp. 21. Because this case is about the government's regulation of private speech, it does not implicate the "government speech" doctrine at all. Petitioner does not seek to interfere with the City's speech, but to prevent the City from banning petitioner's own speech.

The City apparently believes the "government speech" doctrine means that "government speech" is *wholly invisible to the First Amendment*, so that "the bus shelter signs should not be considered at all when analyzing the constitutionality of the ban." Opp. 21-22. That argument is baseless. As noted above, the "government speech" doctrine is based on the premise that the government acts in very different roles as speaker and regulator. Where, as here, the government acts in its role as regulator, the ordinary rules governing government regulation of

speech apply. Thus, the City must defend its ban on commercial speech by proving that the ban directly advances the City's asserted interests in a narrowly tailored way. As part of that analysis, it is both necessary and appropriate to consider the City's own speech—not to abridge that speech, but to assess the validity of the City's ban on private speech. *See, e.g.*, *Greater New Orleans*, 527 U.S. at 188-95 (invalidating statute banning advertising for private casinos but not government casinos). The First Amendment does not allow the government to suppress private speech to make its own speech more valuable.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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